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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The plaintiff having this day presented its petition for appeal now files this statement pursuant to Rule XII of the General Rules of the United States Supreme Court as to the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the final judgment or decree in question.

(A) The Statutory Provisions Believed to Sustain the Jurisdiction

Title 49 of the United States Code, Section 305

"(g) Court review of Commission's orders; compelling Commission to take jurisdiction. Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: Provided, That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any

such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 43 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

"(h) Application of section 17 of this title. All the provisions of section 17 of this title shall apply to all proceedings under this chapter."

Feb. 4, 1887, c. 104, Part II, Para. 205, as added Aug. 9, 1935, c. 498, 49 Stat. 548 and amended June 29, 1938, c. 811, Para. 5-7, 52 Stat. 1237, 1238; Sept. 18, 1940, c. 722, Title I, Para. 20 (c, d), 54 Stat. 922, 923."

Title 49 of the United States Code, Section 17

"(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

Feb. 4, 1887 c. 104, Part I, Para. 17, 24 Stat. 385, as amended Mar. 2, 1889, c. 382, Para. 6, 25 Stat. 861; Aug. 9, 1917, c. 50, Para. 2, 40 Stat. 270; Feb. 28, 1920, c. 91, Para. 430-432, 41 Stat. 492, 493; Feb. 28, 1933, c. 136, 47 Stat. 1368; Aug. 9, 1935, c. 496, Para. 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, Para. 12, 54 Stat. 913."

Title 28 of the United States Code Section 41

Original jurisdiction. The district courts shall have original jurisdiction as follows:

"(28) Setting aside order of Interstate Commerce Commission. Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Para. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Para. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

Title 28 of the United States Code Section 47

"Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application to other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the

Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Urgent Deficiencies Act of Oct. 22, 1913, c. 32, 38 Stat. 220.)"

Title 28 of the United States Code Section 47a.

"Appeal to Supreme Court from final decree; time for taking; priority. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants

in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

(Mar. 3, 1911, c. 231, Para. 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

Title 28 of the United States Code Section 44

"Procedure in certain cases under interstate commerce laws; service of processes of court. The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question by virtue of the express statutory provisions above set forth.

(B) This proceeding or action does not involve the validity of any statute of any state, or any statute or treaty of the United States.

(C) The Date of the Judgment or Decree Sought to Be Reviewed, and the Date Upon Which Application for Appeal Was Presented.

The final judgment or decree herein sought to be reviewed was rendered and entered on November 4, 1944.

The petition for appeal herein was presented and filed on the 2nd day of December, 1944.

(D) The Statement Showing the Nature of the Case and the Rulings of the Court Were Such as to Present the Case Within the Jurisdictional Provisions Relied Upon.

On June 6, 1944 the Interstate Commerce Commission in a complaint proceeding known as MC C-164, at a hearing on reconsideration, entered a cease and desist order, which among other things directed the Adirondack Transit Lines, Inc., the defendant in the said complaint proceeding before the Interstate Commerce Commission, to cease operating between New York City, New York and Weehawken, New Jersey via the Lincoln Tunnel, a vehicular tube connecting the aforesaid cities, and Boulevard East in Weehawken, New Jersey from the New Jersey entrance of the Lincoln Tunnel to the junction of Boulevard East with Pershing Road in New Jersey. The complaint action was in all other respects dismissed by said order.

Pursuant to the statutory provisions hereinbefore set forth, the Adirondack Transit Lines, Inc., the defendant in the aforementioned complaint case, filed a petition on July 27, 1944 in the United States District Court for the Southern District of New York, wherein the plaintiff prayed, in addition to its prayer to set aside, annul, suspend, or permanently enjoin that portion of said order of the said Commission relating to the plaintiff's use of the Lincoln Tunnel and Boulevard East in New Jersey as a route between New York City, New York and Weehawken, New Jersey, for a temporary stay or interlocutory injunction of said portion of said order, pending full and final hearing by the Court.

Pursuant to statute and on the application of the plaintiff the District Judge convened a statutory Three Judge Court to hear the plaintiff's case. The Interstate Commerce Commission at the request of the District Judge extended the effective date of its said order until October 16, 1944 and again on a further request by the District Judge extended the effective date of its order to a date subsequent to the final hearing of the matter, thereby obviating any necessity of consideration by the Court of the plaintiff's prayer for temporary or interlocutory relief; and no hearing on the temporary or interlocutory relief was ever had. The cause duly came on for full and final hearing before the Three Judge Court, and after due deliberation the Court, on the motion of the Attorneys for the United States and the Interstate Commerce Commission respectively, dismissed the plaintiff's petition, rendered its opinion and duly signed and filed its Finding of Facts and Conclusions of Law.

This appeal is prosecuted from the final decree or judgment entered on the 4th day of November, 1944 of the Three Judge Court dismissing the plaintiff's petition to

suspend, annul, set aside or permanently enjoin the said portion of the said order of the Interstate Commerce Commission.

It is respectfully contended that the nature of the instant case and the rulings of the Court are such as to bring the case within the jurisdictional provisions relied upon.

(E) Statement of the Grounds Upon Which It Is Contended That the Questions Involved Herein Are Substantial.

The plaintiff is an omnibus corporation operating numerous omnibuses owned by it in daily service over more than five hundred (500) route miles of highway in the States of New York and New Jersey. It transports millions of passengers in its service annually. The City of New York is its principal terminal point and the largest community served by it. In the City of New York it makes junction with other bus lines operating to other points and places throughout the Eastern United States. Hundreds of thousands are carried annually on its lines which operate between New York City, New York and Weehawken, New Jersey. Almost all of said passengers from New York City are destined to points beyond Weehawken, New Jersey. Almost all of its passengers transported into New York City originate at points beyond Weehawken, New Jersey. All of these passengers are concerned with the means of transportation between the City of New York and the New Jersey side of the Hudson River. The tunnel crossing between New York City, New York and Weehawken, New Jersey, affords an uninterrupted almost limitless capacity, speedy, safe, dependable and public highway. The compliance with the order of the said Interstate Commerce Commission and decision of the Court would obligate the plaintiff to transport

said passengers via the West Shore Railroad Ferry between New York City, New York and Weehawken, New Jersey. Such transportation would be subject to the restricted capacity of the ferry boats, dangers inherent in the use of them in foggy or inclement weather, slippery and icy ferry slips and narrow ferry aisles, the necessity for delay dependent upon ferry schedules and the dependence upon a private transportation facility. For all of said reasons the use of the tunnel is favored and needful in the public interest, safety, comfort, convenience and service. The ferry for said reasons is undesirable. Competing bus lines servicing the same areas via the tunnel would be able to attract from the plaintiff a great majority of the plaintiff's riders and thereby jeopardize the revenues and potentiality for continued service of the plaintiff. Those passengers of the plaintiff which are transported to or from points on the plaintiff's line to which there is no other service would be subjected to unreasonable and unwarranted delay in their journey. No better evidence of the desirability or preference for the use of the tunnel route over the ferry route could be given than the fact that all of the bus lines which used the ferry prior to the inauguration of service via the tunnel are now in operation through the tunnel and no new lines have instituted or inaugurated service via the ferry.

The plaintiff has operated continuously for practically seven years via the tunnel. Reversion to the ferry would deprive its passengers of such proven satisfactory facility and could reasonably expect to result in so substantial a diminution of revenue as would prevent the plaintiff from being able to maintain its service. The plaintiff at points and places in the State of New York pursuant to the authority of the Public Service Commission of the State of New York is engaged in the operation of local intrastate transportation of passengers. Some of this

service is rendered by vehicles which pass between New York City, New York and Weehawken, New Jersey, and the timeliness of the passage of the plaintiff's vehicles through the intrastate areas is of great importance and value to such passengers. The schedule can be reasonably and timely maintained through the use of the tunnel but would be undependable if the plaintiff were required to use the ferry. In many areas the plaintiff's vehicles are the only common carrier transportation facility affording such intrastate service. In some instances timeliness of arrival at junction points on the route is important to passengers transported by it who seek transportation to points beyond on the buses of connecting carriers.

The questions involved herein arise under the provisions of Section 206 of the Interstate Commerce Act, Part II, Title 49 of the United States Code, Section 306a colloquially known as the "grandfather clause."

The plaintiff maintains that the order dated June 6, 1944, of the Interstate Commerce Commission deprives it of a vested right, to wit, the right to operate between New York City, New York and Weehawken, New Jersey, via the Lincoln Tunnel and on Boulevard East in New Jersey from the New Jersey entrance of the Lincoln Tunnel to the junction of Boulevard East with Pershing Road in New Jersey.

The plaintiff maintains that it received such operating rights by reason of a certificate of convenience and necessity issued to it by the Interstate Commerce Commission pursuant to Section 306a of Title 49 of the United States Code, or by reason of the Interstate Commerce Commission's acts of omission or commission in respect to an application filed by the plaintiff on December 23, 1937, on forms prescribed by the Interstate Commerce Commission for a change of route authorizing the aforementioned route

between New York City, New York and Weehawken, New Jersey.

The plaintiff contends that said order of the Interstate Commerce Commission in effect deprives the plaintiff of its said vested right without due process of law, such deprivation being repugnant to and in violation of the Fifth Amendment of the Constitution of the United States. The plaintiff further maintains that said order of the Interstate Commerce Commission amounts to a partial revocation, suspension or change of the plaintiff's certificate of convenience and necessity in violation of and without compliance with Section 312 of Title 49 of the United States Code, the statutory provision providing the manner by which a certificate of convenience and necessity issued by the Interstate Commerce Commission may be revoked, suspended or changed.

The Three Judge Court raised the question of whether the Interstate Commerce Commission could grant the authority the plaintiff claims it received, but did not affirmatively reach a conclusion on that point. These questions are of vital concern not only to this plaintiff but may be a concern to other interstate operators who received a like broad authority from the Interstate Commerce Commission.

A copy of the Three Judge Court's opinion, Findings of Fact and Conclusions of Law and final decree or judgment is appended hereto.

It is respectfully contended that the questions herein are substantial, highly debatable, and have been the source of various opinions emanating from the Interstate Commerce Commission itself.

(F) Cases Believed to Sustain the Jurisdiction

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United

States on a direct appeal to review the final judgment or decree here in question.

Ziffrin, Inc. v. *United States of America, et al.*, 318 U. S. 73;

Howard Hall Co., Inc., v. *United States of America, et al.*, 315 U. S. 495;

United States of America, et al. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475;

United States of America, et al. v. *American Trucking Associations, Inc., et al.*, 310 U. S. 534;

United States of America, et al. v. *Maher, doing business as Interstate Buses*, 307 U. S. 148;

United States of America, et al. v. *Baltimore & Ohio Railroad Co., et al.*, 293 U. S. 454.

Respectfully submitted,

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CLARENCE E. HORN, JR.,
Of Counsel.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC., *Plaintiff*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Before Frank, Circuit Judge, and Leibell and Conger, District Judges.

Proceeding by plaintiff seeking to have a portion of an order of the Interstate Commerce Commission set aside. Dismissed.

Martin J. Kelly, Jr., (Clarence E. Horn, Jr., of counsel) for plaintiff.

James B. M. McNally, United States Attorney for the Southern District of New York (Wendell Berge, Assistant Attorney General, Edward Dumbauld, Special Assistant to the Attorney General, Daniel W. Knowlton, Chief Counsel and Nelson Thomas, Attorney Interstate Commerce Commission, of counsel) for defendants.

Henry P. Goldstein, for Manhattan Coach Line, Inc., Manhattan Transit Company, Westwood Transportation Co., Inc., Westwood Transportation Line, Inc., Inter-City Transportation Co., Inc., Jersey City and Lyndhurst Bus Co., Inc., and Mountain Transit Corporation, Intervenors.

Leland Taliaferro, for Public Service Interstate Transportation Company, Intervenor.

John F. Finerty and John E. Buck, for Hudson & Manhattan Railroad Company, Intervenor.

PER CURIAM:

1. Since the parties agree on the correctness of the facts stated in the Commission's opinion, as supplemented by the opinion of Division 5, we need not repeat them here.

2. Were we entirely free to consider the order of June 4, 1937, and the certificate issued in accordance therewith, without any regard to the Commission's subsequent interpretation in its opinion of June 6, 1944, we would independently for the following reasons, arrive at the same conclusion as did the Commission: (a) It is highly doubtful whether the Commission, in granting, as it did, a certificate pursuant solely to 49 U. S. C. A. Sec. 306, could validly authorize the use of a tunnel in existence neither in or before 1935 nor at the time of the issuance of the certificate. Accordingly, as the certificate did not unambiguously authorize such use, it should be interpreted not to permit it. (b) The certificate does not authorize transportation under but merely "across" the river. (c) The words in Sec. 306, "within the territory," "refer, we think, to carriers which, in the required period, had, in whole or part, no regular routes; and plaintiff did not come within that category. (d) The failure of the Commission to act on the application of December 23, 1937, was not the legal equivalent of an order granting the application; it is irrelevant that Division 5 failed to act on that application because it believed the order of June 4, 1937 already permitted the use of the tunnel.

3. But we must decide against plaintiff in any event. At best, the Commission's order is ambiguous. So regarding it, its interpretation is for the Commission; and the Courts cannot disregard such an interpretation in those circumstances unless it is clearly erroneous or arbitrary, and the interpretation here is not.

JEROME N. FRANK,
Circuit Judge.
VINCENT L. LEIBELL,
District Judge.
EDWARD A. CONGER,
District Judge.

Dated: October 16, 1944.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Findings of Fact and Conclusions of Law

Findings of Fact

As both parties concede that the facts as stated in the Commission's opinion, supplemented by that of Division 5, are correct, we so find, and adopt them as our findings herein, and there is no occasion for this Court to repeat them.

Conclusions of Law

1. The Commission probably lacked power to grant a certificate pursuant to 49 U. S. C. A. Sec. 306, which authorized the use of a facility not in existence in or prior to 1935, or even at the time of the issuance of the certificate. Accordingly, if possible, the certificate should be so construed as not to authorize such use, and the certificate can be so construed.

2. Quite aside from the foregoing, the Commission's interpretation of its own order and certificate cannot be disregarded by the courts unless such interpretation is clearly erroneous or arbitrary, and the Commission's interpretation is neither.

3. The failure of the Commission to act on the application of December 23, 1937 is not the equivalent of Com-

mission action. It is irrelevant that no such action was taken because Division 5 thought an order superfluous.

The petition is dismissed.

JEROME N. FRANK,
Circuit Judge;
VINCENT L. LEIBELL,
District Judge;
EDWARD A. CONGER,
District Judge.

Dated: October 16, 1944.

APPENDIX "C"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ADIRONDACK TRANSIT LINES, INC., *Plaintiff,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Judgment

Civ. 26-508

This cause having duly come on for hearing before this court and the parties having appeared by their respective attorneys and having adduced their proofs, and due deliberation having been had and the court having rendered its opinion dismissing the petition, and Findings of Fact and Conclusions of Law having been signed and filed herein.

Now, on motion of John F. X. McGohey, United States Attorney, attorney for the United States of America and Nelson Thomas, attorney for Interstate Commerce Commission, it is

Ordered that the petition of the plaintiff be and the same is hereby dismissed and it is

Further Ordered And Adjudged that the defendants, United States of America and Interstate Commerce Commission, have and recover judgment, in the sum of $30.00 costs as taxed against the plaintiff, Adirondack Transit Lines, Inc., of Kingston, New York.

Dated: New York, Nov. 3rd, 1944.

JEROME N. FRANK,
Circuit Judge;
VINCENT L. LEIBELL,
District Judge;
EDWARD A. CONGER,
District Judge.

Judgment rendered. George J. H. Follmer. Nov. 4, 1944.

(6400)

Office - Supreme Court, U. S.
FEB 21 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 913

ADIRONDACK TRANSIT LINES, INC.
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

MEMORANDUM IN OPPOSITION TO MOTIONS TO AFFIRM JUDGMENT OF DISTRICT COURT AND IN OPPOSITION TO STATEMENTS AGAINST JURISDICTION

MARTIN J. KELLY, JR.,
Counsel for Appellant.

CLARENCE E. HORN, JR.,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 188

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 913

ADIRONDACK TRANSIT LINES, INC.
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

MEMORANDUM IN OPPOSITION TO MOTIONS TO AFFIRM JUDGMENT OF DISTRICT COURT AND IN OPPOSITION TO STATEMENTS AGAINST JURISDICTION

The Plaintiff-Appellant files this brief pursuant to Rule XII, paragraph "3" and Rule VII, paragraph "3" of the General Rules of this Court.

The United States of America and the Interstate Commerce Commission, Defendants-Appellees, filed a joint motion to affirm the decree of the District Court.

The Defendant-Intervenor-Appellee, Hudson & Manhattan Railroad Company has filed a motion to affirm the order and judgment of the District Court and a Statement against Jurisdiction.

The Defendants-Intervenors-Appellees, Manhattan Coach Lines, Inc., Manhattan Transit Company, West-

wood Transportation Co., Inc., Westwood Transportation Lines, Inc., Intercity Transportation Co., Inc., Jersey City & Lyndhurst Bus Co., Inc. and Mountain Transit Corporation, have filed a motion to affirm the decree and judgment of the District Court and a Statement against Jurisdiction.

Appellant in Opposition to the Motion to Affirm Filed by the United States of America and the Interstate Commerce Commission States the Following in Respect to the First Issue:

The facts of the instant case are not disputed. Only issues of law are involved.

It is the contention of the Appellant, a common carrier of passengers by motor vehicle, that its use of the Lincoln Tunnel, a vehicular tube between and connecting New York City, N. Y., with Weehawken, N. J., as a route between the aforesaid municipalities, is not in violation of the certificate of convenience and necessity issued to it by the Interstate Commerce Commission.

The Appellant contends as a matter of law, which contentions are the sole issues herein, that such right or authority to use the tunnel crossing accrued to it by virtue of the express provisions of its certificate of convenience and necessity. It also claims such right by virtue of its filing an application for a change of route with the Interstate Commerce Commission, which application specifically designated the Lincoln Tunnel and adjoining streets as the route of travel between Weehawken, N. J., and New York City, N. Y., and the resulting acts of omission and commission of the Interstate Commerce Commission on said application.

The Appellant's said certificate designates the Appellant's route between Saranac Lake, N. Y., and New York City, N. Y., via routes specified therein from Saranac Lake,

N. Y., to the intervening point of New Jersey Highway S5. Said certificate continues as follows:

> "* * * Thence over New Jersey Highway S 5, New Jersey Highway 1, and unnumbered roads *to Weehawken, N. J., and thence across the Hudson River to New York and return over the same route.*"

Appellant's certificate was issued pursuant to Section 206(a) of the Interstate Commerce Act (Part II), colloquially known as the "grandfather clause." Said "grandfather clause" empowered the Interstate Commerce Commission to grant certificates of convenience and necessity to interstate motor carriers who were engaged in service on June 1, 1935, and had continuously thereafter remained so engaged, subject to certain exceptions or provisions not pertinent herein.

Appellant's application for said certificate was made January 31, 1936, and said certificate was issued by said Commission, June 4, 1937, effective July 5, 1937. Prior to the issuance thereof and on January 18, 1937, at an informal hearing before an Interstate Commerce Commission representative authorized to conduct the same, an amendment to the Appellant's "grandfather" application was accepted by and filed with the Interstate Commerce Commission. The record discloses such filing and the Interstate Commerce Commission admits it. Almost five months later said Commission issued said certificate of convenience and necessity, the portion of which heretofore set forth, is now in question.

The description of that portion of said certificate, "Weehawken, N. J., and thence across the Hudson River to New York, * * *" is admittedly broad in scope. Broad not in respect to designation of the termini points, but broad only as to the designation of the manner of traversing the Hudson River between Weehawken, N. J., and New York City, N. Y. The Appellees contend and the District

Court held that this portion of said certificate is ambiguous, and that it therefore follows that if said certificate is ambiguous, then the said Commission has the right and the power to interpret and construe its own order and certificate unless such interpretation or construction is erroneous or arbitrary. The Appellant agrees that the Commission does have the power to interpret and construe its own orders and certificates where the same are ambiguous, and that its interpretation and construction is entitled to great weight.

However, it logically follows that if said certificate is not ambiguous, no interpretation or construction by the Commission is necessary or proper. Appellant contends said certificate is not ambiguous, and the same is not subject to interpretation.

The only color of ambiguity that can be attached to Appellant's certificate is that it is broad in scope, and a finding of ambiguity predicated on the ground that no particular manner or route of traversing the Hudson River between Weehawken, N. J., and New York City, N. Y., has been designated, is unwarranted and illogical.

It is this interpretation of the Court that the Appellant contends is arbitrary and erroneous. In issuing the certificate to the Appellants, the route of the Appellants as indicated in their original application over several hundred miles of highway in the States of New York and New Jersey was meticulously followed. The Commission being cognizant of the proposed modification in the Appellant's routing between Weehawken, N. J., and New York City, N. Y., issued a certificate which, in this area only, did not meticulously follow the route specified in the Appellant's original "grandfather" application. In this immediate area only did its certificate broaden the authority granted to the Appellant. The purpose and intent of such grant would appear to be obvious and not ambiguous.

However, although the Appellant denies that its certificate is ambiguous and thereby subject to the Commission's interpretation, Appellant will assume for purpose of argument that the certificate is ambiguous. Would then the construction heretofore applied by the District Court and the Commission be correct. Appellant submits that such construction is arbitrary and erroneous. Overt acts and actual conduct of the Commission are such as to compel the Commission to interpret said certificate as authorizing the use of the tunnel.

The record shows that when the original application for a certificate of convenience and necessity was made by the Appellant, pursuant to Section 206(a) of the Interstate Commerce Act (Part II), the Appellant's route across the Hudson River between Weehawken, N. J., and New York City, N. Y., on June 1, 1935 was the West Shore Railroad Ferry, and such route was so specified in the application. Almost five months before the issuance of the certificate, the Appellant filed with the Commission at the aforementioned informal hearing, an amended "grandfather" application requesting the use of the tunnel crossing between New York City, N. Y., and Weehawken, N. J., on the opening thereof. Prior to the issuance of the certificate, the Commission had before it the Appellant's original "grandfather" application for a certificate and the said amended application. The certificate so issued did not specify the route as set forth in the original application, but was couched in the broad language. "Weehawken, N. J. thence across the Hudson River to New York * * *." That such broad description of route was given cannot be attributed to mistake. The report of Division 5 of the Interstate Commerce Commission said in respect to the issuance of the certificate "Here, there is no question of fraud, misrepresentation, or a certificate issued in error." At no time has it been contended or held by the Court, the Commission or the Appellees that there was fraud, mis-

representation or mistake in the issuance of Appellant's certificate.

The intent of the Commission is further evidenced by the fact that one day subsequent to the opening of the tunnel to public and commercial vehicular use, Appellant filed with the Interstate Commerce Commission on forms prescribed by the Commission for such purpose an application for change of route. The printed matter on said forms advised that if application was not granted, applicant would be sent proper forms in order to apply for a certificate or a permit to extend operations. It is undisputed that the Commission never forwarded any forms to Appellant. The form on which application was made was prepared by the Commission and furnished to applicants by virtue of the Commission's order dated May 17, 1937. Appended to said form and printed thereon is an explanation. This explanation contains the following words:

> "If the application is not granted the applicant will be sent proper forms in order to apply for a certificate or permit to extend operations."

This explanation was, as appears from the record, a part of the order of the Commission itself approved on the aforementioned date.

What intent is disclosed by such action or non-action on the Commission's part? If the original intent had not been to authorize the use of the tunnel crossing by the Appellant's certificate, the Commission would be obligated to notify the Appellant to apply for a certificate or permit to extend operations, particularly when by the wording of their forms, they charged themselves with the duty of giving notice in event said application for change of route was denied. On December 22, 1937, the day the Lincoln Tunnel was opened for use, Appellant herein discontinued its operations between New York City, N. Y., and Weehawken, N. J., via the ferry and routed its operations be-

tween the aforesaid municipalities via the tunnel route, and has operated daily and continuously through the tunnel since the opening thereof.

The original complaint proceeding out of which the issues herein arose, was not brought on the motion of the Commission, but was instituted by some of the intervenors herein by complaint dated January 15, 1940. While such inaction on the part of the Commission might ordinarily not reflect any tangible evidence of intention, viewed in the light of the open and constant use of the tunnel by the Appellant accompanied by the foregoing application for change of route and "grandfather" amendment filed with the Commission, creating the additional notice of record, the ostensible acquiescence of the Commission to such operation, must constitute to a great degree a recognition of lawful operation.

Further and strong evidence of intention is disclosed by the following excerpt from the report of Division 5 wherein the following statement appears:

> "On January 18, defendant (Appellant herein) filed an amendment to its 'grandfather' application and sought authority to operate through the tunnel on its completion. On December 23, 1937, after its certificate was effective, defendant filed a change-of-route application in which it sought the right to cross the Hudson River through the tunnel instead of by using the ferry. Since the certificate theretofore granted did not specify the means of crossing the Hudson River, *the use of the tunnel was not considered a violation of the terms of the certificate and no action was taken on the application.*" (Parentheses and italics supplied.)

The Appellant contends the interpretation and construction of the Appellant's certificate by the full Commission in its opinion of June 6, 1944, which construction and interpretation was affirmed by the District Court, is so violently

opposed to each and every overt act of the Commission, as heretofore mentioned, that such construction and interpretation is erroneous and arbitrary. The Appellant is not alone in contending that the interpretation which it has put on the certificate issued to it and the subsequent action of the Commission with respect to the amendment of route authorized its service via the tunnel is the proper one. It should be significant at this point to call the Court's attention to the fact that the Examiner before whom the matter was tried considered the operation justified under the facts and that he was supported in this conclusion by Division 5 of the Commission to which Division the matter was submitted on exceptions to the report and that on the full Commission's decision, four Commissioners dissented from the Commission's order overruling Division 5.

The Appellees contend that this is not a proceeding to suspend, change or revoke a certificate as contemplated by Section 212(a) of the Motor Carrier Act. But of what moment is this argument when the effect of the order is tantamount to a partial revocation, modification and suspension of the authority granted to the Appellant by the Commission's certificate. The order of the Commission construing the section of the certificate under consideration here has stated that they will construe it to mean "from Fairview over Fairview Avenue to North Bergen; thence over Park Avenue; thence over Boulevard East to its intersection with Pershing Road (in Weehawken); thence over Pershing Road to the 42nd Street Ferry of the West Shore Railroad (in Weehawken); thence by ferry to New York." This is certainly not the route specified in the certificate; it is not the route specified in the application; it is not the route specified in the amendment to the application. It is in effect an attempt to restrict the Appellant's routing in an area where the Appellant enjoys a broader certificated authority. It is not contended that the certificate issued by the Commission to the Appellant was procured by fraud

or misrepresentation or issued by mistake. In the absence of these facts the certificate itself should constitute the Appellant's authority. That which the Appellant is authorized by the certificate to do it should be able to do. That which it may not do pursuant to the terms of the certificate it is precluded from doing. The only authority for suspension, termination, revocation or amendment of a certificate issued by the Interstate Commerce Commission is contained in Section 312 of the United States Code (Section 212 of the Motor Carrier Act):

> "In the case of Smith Brothers, John C. Sandidge, Receiver, Revocation of Certificate (MC 16670), Vol. 33 Motor Carrier Cases 465, at page 472, the Commission states as follows:
>
> "In our opinion, the language of the foregoing section (Section 212 of the Motor Carrier Act) is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding." (Parentheses supplied.)

In issuing its cease and desist order here on appeal the Commission has disregarded the express authority granted by it to the Appellant. It has by such order attempted to amend its pre-existing certificate. In effect, the theory followed by the Commission has been to take the position that the authority granted should not have been granted

and to take the position that despite the wording of the authority contained in the certificate, the Commission would effectively amend the same by its cease and desist order and require the Appellant to return to the route followed by it in its service on June 1, 1935. The cease and desist order is an attempt to effect an amendment of the Appellant's certificate without fulfilling the requirements of Section 312 of the United States Code. With what security can the public deal thereafter with a certificate. The Appellant's certificate plainly does not specify the ferry and does not require the reversion by the Appellant to the ferry as a means of crossing the Hudson River between Weehawken and New York. Such a crossing is not specified in the certificate. A stranger to the former service of the Appellant upon reading the certificate could not realize that any such limitation of street routings in Weehawken as proposed by the Commission in its cease and desist order was applicable to the Appellant's certificate. If the decision of the Commission is sustained, then the wording of a certificate is of no moment since the determination of the rights therein contained cannot be gleaned from the wording thereof. Recourse must be had to history although the certificate puts nobody on notice that it is not self-contained and self-descriptive.

The Appellant's certificate is most certainly not restricted by its words to the highway and river crossing used by the Appellant on June 1, 1935. This, however, would be the effect of the enforcement of the cease and desist order.

The Court's decision in upholding the Commission's action which in this manner amends, suspends, terminates and revokes in part the authority contained in the Appellant's certificate is inequitable and erroneous.

In Reply With Respect to Defendants-Appellees, United States of America and Interstate Commerce Commission, Second Issue:

The Appellees urge that the Commission by virtue of Section 206(a) of the Interstate Commerce Act is empowered to issue a certificate under that clause to a carrier only if "any such carrier or predecessor in interest was in *bona fide* operation as a common carrier on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time"; and that since Appellant did not and could not operate via the Lincoln Tunnel during the grandfather period the Commission was not authorized under the "grandfather" clause to grant operating rights over such route.

However, the Commission does not subscribe to the theory that the "grandfather" clause froze all activities of interstate carriers to the exact route the carrier was operating on the crucial day, June 1, 1935. The Appellant strongly urges that the Commission has recognized the distinction between an actual change in route and a deviation or modification wholly within municipalities.

In making its change from the Ferry crossing to the Lincoln Tunnel crossing of the Hudson River, the plaintiff was required to extend its route approximately seven-tenths of a mile. This extension was wholly within the Town of Weehawken, N. J. into which town the plaintiff had received authority to operate.

The Commission's general rule with respect to deviations of routes by a carrier within a municipality is that it is not concerned with such deviations. Only in exceptional cases where the deviations of routes within a munic-

ipality goes to the essence of the operation itself are they concerned. In issuing the certificate to the Appellant they did so without foreknowledge that approximately two years thereafter they would make a determination that exceptional circumstances prevailed in the New Jersey area adjacent to the Lincoln Tunnel. The Appellant's certificate, therefore, should be considered as having been granted under the provisions of the Commission's general rule. It is the Appellant's contention that this is exactly what happened. No question of convenience and necessity in the use of the Lincoln Tunnel was involved at the time of the issuance of the certificate to the Appellant nor at the time of the commencement of service by the Appellant through the Lincoln Tunnel at the opening thereof. No specified authority was required by the Appellant to make this change from the ferry crossing to the tunnel crossing between Weehawken, New Jersey and New York City, New York. As long as the Appellant had the authority to cross the Hudson River from Weehawken, N. J. to New York City, N. Y., it could use any river crossing which travelled between said two points.

In *White Horse Pike Bus Company, Incorporated, Common Carrier Application* (No. MC 1973) 2 Motor Carrier Cases 79 at page 80, Division 5 in granting a certificate to an interstate bus line, stated as follows:

> "Various streets within Philadelphia, Camden, Absecon, Pleasantville, and Atlantic City are included in the description of regular routes in the application. We are not concerned here with the routes traversed within municipalities or with the routes over which applicant operates between adjoining municipalities. Camden adjoins Philadelphia, Absecon adjoins Pleasantville, and Pleasantville adjoins Atlantic City. The routes between Camden and Philadelphia, Absecon and Pleasantville and Pleasantville and Atlantic City need not be specified in any certificate granted herein."

In the foregoing case a certificate not limited as to street routings within large cities such as Philadelphia, Pa., Camden, N. J. and Atlantic City, N. J. was granted for a bus operation under a "grandfather" application. This case was submitted March 6, 1937 and decided May 26, 1937.

It is significant to note that even though the applicant here specified in the description in its application streets within Philadelphia, Pa., and Camden, N. J., two very large communities, one of which is the third largest city in the United States, the Commission as of the date of this petition between such points did not concern itself with the street routings.

In *Nevin Midland Lines, Common Carrier Application* (MC 18975), 4 MCC 547, Division 5 in issuing a certificate on the "grandfather" application for an omnibus carrier, stated:

> "We have considered the record and find that the examiner adequately stated that facts in the following report which accompanied his recommended order, although we take occasion to add that his statement of the doctrine that the Commission is not concerned with routes traversed within municipalities must be read in the light of the routes here considered and is therefore not to be accepted as a precedent for use in any case in which the routes within municipalities constitute the very essence of the operation or at least assume greater importance than here. We express no opinion as to what our decision might be in those circumstances."

The statement of the Examiner referred to as to the Commission's doctrine with respect to routes traversed within municipalities, 4 MCC 550, is as follows:

> "Various streets in the cities on the claimed routes are described in the application, as amended. The Commission is not concerned with routes traversed within municipalities, and such streets need not be specified in any certificate granted herein."

Some of the cities involved in the application passed upon were New York, N. Y., Washington, D. C., Jersey City, N. J., Newark, N. J., Elizabeth, N. J., Trenton, N. J., Philadelphia, Pa., Baltimore, Md., New Brunswick, N. J., and Pittsburgh, Pa.

The *Nevin Midland Lines* case was submitted December 24, 1937, decided February 28, 1938, and it is significant to note that the operations included service between New York City, N. Y., and Jersey City, N. J., through the Holland Tunnel. As of such date, therefore, the Commission did not consider the delineation of streets within a large New Jersey City connected by tunnel with New York City, as a necessary part of the certificate.

The certificate of the Appellant was issued June 5, 1937, effective July 5, 1937. We, therefore, see that in May, 1937, a few months prior to the issuance of the certificate to the Appellant the delineation of street routes between the large communities of Philadelphia, Pa., and Camden, N. J., was not considered of sufficient importance to be included (*White Horse Pike Bus Company, Incorporated*) and as of a date a year and a half after the certificate was issued to the Appellant, the Commission was still of the opinion that the delineation of streets in a certificate authorizing service between New York City, N. Y., and Jersey City, N. J., was not of its concern (*Nevin Midland Line*).

Even in the case of *Lincoln Tunnel Applications,* submitted December 8, 1938, decided March 10, 1939, 12 Motor Carriers Cases 184, at page 198, in referring to the service within the Borough of Manhattan, City of New York, in connection with applications for the use of the Lincoln Tunnel between New Jersey and New York, Division 5 stated:

> "It becomes relatively unimportant, therefore, as to which routes the operators traverse within the

terminal area in Manhattan, and in view of the fact that there is a measure of control by the city over the use of its streets, there appears to be no necessity for designating the routes within Manhattan."

The Commission in the *Lincoln Tunnel Applications,* however, found it necessary to make a complete designation of routes within the New Jersey territory involved therein. It is, therefore, only as a result of a determination made a year and a half subsequent to the effective date of the Appellant's certificate that the Commission made a determination that street routings in the New Jersey territory specified in the *Lincoln Tunnel Application* case was a matter with which they were concerned.

It does not appear plausible nor equitable, therefore, that the Appellant's certificate which had been in effect since July 5, 1937, should be subject to the subsequent exceptional determination requiring street routings in such New Jersey territory.

See also:

Cincinnati, Newport and Covington Rwy. Co., Common Carrier Application, 30 M. C. C. 423 at page 440 *et seq.*

Therefore, the change made by the Appellant from the ferry to the tunnel, was, in the light of the foregoing cases a deviation or modification of route, and not a change of route repugnant to the "grandfather" clause according to the rulings of the Commission which deviations were of no concern to the Commission. Any attempt to apply the findings of the *Lincoln Tunnel Applications,* is tantamount to affecting a retroactive determination inconsistent and contrary to the existing law at the time of the opening of the Lincoln Tunnel to vehicular traffic and the use thereof by the Appellant's omnibuses.

The Appellees advance a lesser argument that the "District Court observed that the Appellant's certificate did not authorize transportation under, but merely 'across' the river." Webster's Unabridged Dictionary defines "across" as follows: "From side to side; opposed to along; crosswise; transversely from one side to another." From the aforegoing definition it is obvious that "across" is extremely broad in meaning. It is difficult to contend that a sufficient limitation of meaning can be attached to this word so as to determine the manner by which the Appellant may traverse the Hudson River.

It is significant to note in this respect also that the Commission itself in referring to the Lincoln Tunnel refers to it as a river crossing. The Court states in its opinion that the certificate authorizes transportation "merely across the river" and indicates that this does not, in their opinion, authorize service across via the tunnel. Would their contention likewise be that the George Washington Bridge does not go across the river? The Commission itself in *Lincoln Tunnel Applications,* 12 M. C. C. 184 at page 187 states as follows:

> "In 1937 the Holland Tunnel and George Washington Bridge, port authority *crossings* handled approximately 13,000,000 and 8,000,000 vehicles respectively and the ferries carried over 13,000,000" (Italics ours.)

and again on the same page:

> "in 1937 there were nearly 1,000,000 bus *crossings* of the George Washington Bridge and Holland Tunnel and it was estimated that there would be 300,000 bus *crossings* of the Lincoln Tunnel in 1938." (Italics ours.)

It, therefore, appears that the Commission finds the bridge, the tunnel, and the ferries as all river *crossings.*

In Reply With Respect to Defendants-Appellees United States of America and Interstate Commerce Commission, Third Issue:

Appellees' third issue deals with the change-of-route application filed by the Appellant with the Interstate Commerce Commission on December 23, 1937, on forms prescribed by the Commission, which filing was made one day subsequent to the opening of the tunnel.

A true copy of said application is as follows:

B. M. C. 70 M. C.

INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

APPLICATION FOR CHANGE OF ROUTE

Name ADIRONDACK TRANSIT LINES, INC. dba

Address, 241 W. 42nd Street, New York City, N. Y.

OLD ROUTE: Between Weehawken, N. J. and New York City, N. Y. as follows: via 42nd Street Ferry.

NEW ROUTE: Between Weehawken, N. J. and New York City, N. Y. as follows: via Lincoln Tunnel.

NOTE. The only modification in route applied for herein concerns the manner of traversing the Hudson River between New York and New Jersey and a slight alteration of street routes within the limits of Weehawken, N. J. and New York City, N. Y. There is no substantial change in service between the terminal points or to and from intermediate and off route points, and no question of public convenience and necessity as set out in Section 207 of the Motor Carrier Act or consistency with the public interest and

policy as set out in Section 209B of said Act. No additional towns, cities or villages are served under the amended and none are deprived of service by reason of said amendment. The motor carrier's application for certification stated its intention to use the Lincoln Tunnel upon its completion.

No map, specifically outlining both routes, is submitted with this application by reason of the foregoing.

A copy of this application was served, in person or by registered mail, upon all known direct competitors by motor vehicle, rail, or water as follows:

None.

A copy of this application was filed with the following State Boards having jurisdiction over motor-carrier operations along the old and new route:

Public Service Commission, State Office Building, Albany, Board of Public Utility Commissioners, Trenton, N. J.

(Verified December 21st, 1937)

(Signed) Martin J. Kelly, Jr.,
Secretary.

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 17th day of May, A.D. 1937.

In the Matter of Applications for Change of Authorized Route

The matter of applications under the above title being under consideration:

It is ordered, That applications for change of route authorized under the Motor Carrier Act, 1935, shall be in the

form and contain the information called for in the form of application attached hereto and made part hereof.

IT IS FURTHER ORDERED, That the verified original application and one copy thereof shall be filed with this Commission, and that one copy shall be delivered in person or sent by registered mail to the Board, Commission, or official of each State in which applicant operates (or to the Governor where there is no Board, Commission, or official) having authority to grant or approve certificates or permits authorizing motor carrier operations in intrastate commerce, and that one copy shall be served, in person or by registered mail, upon each motor carrier and each carrier by rail or water, known to the applicant, with whose service the operations described in such application are or will be directly competitive.

By the Commission, Division 5.

W. P. BARTEL,
Secretary.

(Seal)

EXPLANATION

A motor carrier engaged in transportation requiring a certificate or permit from this Commission may secure permission to make a change of route without complying with section 207 or section 209(b), and without the formality of a hearing, if the change of route satisfies the following two requirements:

(1) The change in use of highways must not amount to any substantial change in service between the terminal points, or to and from intermediate and off-route points.

(2) The change in route must not involve any question of public convenience and necessity as set out in

> section 207, or consistency with the public interest and policy as set out in section 209(b).

If the application is not granted, the applicant will be sent proper forms in order to apply for a certificate or permit to extend operations.

Appellant stated in said application that no question of public convenience and necessity or consistency with the public interest and policy was involved. This statement was true since the Appellant was making a deviation in the route traversed by it within the scope of authority contained in its certificate. It was filed pursuant to the provisions of the order of the Commission dated May 17, 1937, heretofore set forth in its entirety.

The attention of the Court is directed to the last paragraph of the "Explanation" wherein the following is stated:

> "If the application is not granted, the applicant will be sent proper forms in order to apply for a certificate or permit to extend operations."

As recited in the Appellees' brief the Commission never took any action with respect to this application. No forms were ever sent to the Appellant. Did the admitted non-action on the part of the Commission convey any rights to the Appellant? It would logically follow that if the Appellant already had the right to use the tunnel, such application, if effective, could not grant a right already vested in the Appellant. If, however, the Appellant had not acquired a right to use the tunnel by December 23, 1937, it is the Appellant's claim that the right to use the tunnel was given to the Appellant by virtue of the filing of said application with the Commission. The Appellant has made a diligent search for legal precedent pertinent to this issue, but believes that none exist. The Appellant

respectfully urges that *Union Stockyard* v. *U. S.*, 308 U. S. 213, cited by Appellees is not applicable here.

The Commission saw fit to make a declaration whereby it succinctly informed the public that in the event that the application was not granted, applicant would be sent proper forms.

By such explanation the Commission made known the manner by which it would administer the disposition of applications for change-of-route. It is submitted that the Commission saw fit to adopt a particular method for the granting or denying of this application, and that by reason thereof, its silence or inaction was its manner of granting said application. This is the only equitable construction that can be given.

Conclusion With Respect to the Motion to Affirm by Appellees United States of America and Interstate Commerce Commission:

Appellant in conclusion respectfully submits that it has the right or authority to use the Lincoln Tunnel as a means of travel between Weehawken, New Jersey, and New York City, New York; that such authority was granted by the certificate of convenience and necessity issued to it by the Interstate Commerce Commission. That the interpretation and construction given to its certificate by the Commission and the District Court were arbitrary and erroneous. That in the alternative, if the authority for such means of travel is not granted by its certificate, then it can be found that the Appellant's change to the tunnel crossing was a deviation not tantamount to a change of route in violation of its certificate but was a deviation which the Commission was not concerned with, or in the further alternative, that if it be found that the Appellant had no authority or right to use the tunnel crossing, then

such right was granted by the Commission to the Appellant by reason of the filing of the application for a change of route.

No statement against jurisdiction was made by the Defendants-Appellees, United States of America or Interstate Commerce Commission.

Reply With Respect to Motions to Affirm and Statements Against Jurisdiction Filed by Defendants-Intervenors-Appellees—Hudson & Manhattan Railroad and Manhattan Coach Line, Inc., Et Al.:

With the exception of the statements against jurisdiction, made by the Intervenors-Appellees—the issues and contentions respectively raised and advanced are substantially the same as those covered in the brief of the United States of America and the Interstate Commerce Commission and a further discussion of the same would be merely repetition and would serve no purpose.

However, the brief of the intervenors attacks the jurisdiction of the Court. The Appellant will stand on the substantiality of the questions involved herein as now set forth in its jurisdictional statement. However, for a further but brief comment on the question herein, it is respectfully submitted that in the Appellant's opinion, although numerous citations and decisions of this Court are set forth, not one is controlling. That the questions involved are novel and highly debatable is best illustrated by a concise history of the matter. The Examiner before whom the original proceeding was instituted, found the Appellant's use of the tunnel was lawful; Division 5 affirmed; and the full Commission, on reconsideration, reversed the finding as to the tunnel operation with four Commissioners dissenting. The statutory Court although a *per curiam* decision, did not cite one case in support of its decision.

The purported authorities cited by the Appellees in their motion to affirm are inapplicable or in instances where they have any application to the issues involved herein are more helpful to the Appellant than to the Appellees. The case of *Noble* v. *United States*, 319 U. S. 88; *Crescent Express Lines* v. *The United States*, 320 U. S. 401; *United States* v. *Maher*, 307 U. S. 148 are decisions of this Court upholding the action of the Interstate Commerce Commission in imposing terms and conditions on the granting of a certificate or denying application for a certificate. The Appellant does not contend that the Commission lacks the power to restrict or deny an application but this is not a proceeding to acquire a certificate. This is a proceeding to utilize a certificate in accordance with its terms. The cases of *Alton Railroad Company* v. *United States*, 315 U. S. 15 and *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475 are more helpful to the Appellant than to the Appellees. For each of these cases in fact hold, at least in part, that the Commission may authorize a greater authority under a "grandfather" application than the activity on the effective "grandfather" date would have justified. The *Lincoln Tunnel Application* case itself, 12 M. C. C. 184, was an instance in which certain operators sought certificates. The Commission could and did require before the granting of such certificates the establishment of the requisite proof warranting the issue thereof. *Pennsylvania Greyhound Lines, Inc., Lincoln Tunnel Route*, 30 M. C. C. 333, was wholly inapplicable as the change of route in this case required the carrier to traverse communities not theretofore served.

The Appellant's certificate was granted to it pursuant to Section 306 of the United States Code. There is no provision in this section which requires a certificate to specify by specific routing the authority granted to a passenger carrier by motor vehicle. It is true that Section 307 which is not pertinent to this "grandfather" application

has such a requirement. The Appellant's certificate was not issued pursuant to Section 307. Authority is therefore existent for a certificate on a "grandfather" application for passenger carriers in which the specific routing might not be specified provided the territory is set forth. No new or different communities are involved in the Appellant's operation through the tunnel than were involved in their operation via the ferry. Insofar as a "grandfather" certificated operator may be required to submit to the Commission proof of public convenience and necessity before the Commission may be authorized to grant authority for service other than that in which the applicant was specifically engaged on the effective date of the "grandfather" clause, the Commission in this case was not lacking in such proof.

At the informal conference called by the Interstate Commerce Commission in support of the Appellant's application for a "grandfather" certificate the Appellant's president stated that the use of the Lincoln Tunnel would afford a quicker, safer route for crossing the Hudson River. This could constitute sufficient evidence of public convenience and necessity to justify any extension of authority by the Commission to the Appellant.

Conclusion With Respect to the Motions to Affirm and Statements Against Jurisdiction Filed by Defendants-Intervenors-Appellees—Hudson & Manhattan Railroad and Manhattan Coach Line, Inc., Et Al.:

Appellant adopts the conclusion heretofore stated in respect to the Defendants-Appellees, United States of America and Interstate Commerce Commission and urges that this Court find that the questions involved herein are substantial.

CONCLUSION

Wherefore, Appellant Respectfully Prays That the Motions Filed by Appellees Herein Be Denied and That the Statements Against Jurisdiction Be Dismissed.

Respectfully submitted,

MARTIN J. KELLY, JR.,
Counsel for Appellant,
Office and Post Office Address,
70 Pine Street,
Borough of Manhattan,
City of New York.

CLARENCE E. HORN, JR.,
Of Counsel.

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing document upon the following attorneys of record in this proceeding by mailing by first class mail a copy thereof properly addressed to each of said following attorneys:

NELSON THOMAS,
Interstate Commerce Commission,
Office of Chief Counsel,
Washington 25, D. C.

HENRY P. GOLDSTEIN,
1450 Broadway,
New York 18, N. Y.

JOHN F. FINNERTY,
120 Broadway,
New York 5, N. Y.

LELAND TALIAFERRO,
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JOHN F. X. MCGOHEY,
United States Attorney,
United States Courthouse,
New York, N. Y.

EDWARD DUMBALD,
Special Assistant to the Attorney General,
Department of Justice,
Washington 25, D. C.

Dated at New York, N. Y., this 20th day of February, 1945.

MARTIN J. KELLY, JR.,
Counsel for Appellant,
Adirondack Transit Lines, Inc.

In the District Court of the United States for the Southern District of New York

CIVIL No. 26–508

ADIRONDACK TRANSIT LINES, INC.,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final judgment,[1] dated November 3, 1944, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiff's complaint to set aside an order of the Interstate Commerce Commission. The Commission's report and order, dated June 6, 1944, required plaintiff to desist and abstain from certain motor-bus operations found by the Commission to be unlawful, unless and

[1] The Court also on October 16, 1944, rendered a *per curiam* opinion and made findings of fact and conclusions of law.

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until plaintiff shall have received an appropriate certificate of public convenience and necessity authorizing such operations. The operations thus prohibited consisted of transportation between Weehawken, New Jersey, and New York City through the Lincoln Tunnel instead of by ferry. An appeal was allowed on December 2, 1944, and appellees were served with the appeal papers on December 8, 1944.

There is no controversy as to the facts. The Commission's report and order were entered on the complaint of certain bus lines, intervening defendants here, which are engaged in short-haul mass transportation between New York City and urban territory in New Jersey. In this complaint they charged that plaintiff was engaging in certain transportation not authorized under a certificate of public convenience and necessity, which it held, and prayed that plaintiff be ordered to discontinue such operations. From the Commission's report of June 6, 1944, it appears that plaintiff holds a certificate, issued by the Commission on June 4, 1937, under the "grandfather clause" of Section 206 of the Interstate Commerce Act (49 U. S. C. 306), authorizing, *inter alia,* service between Saranac Lake, New York, and New York City over certain highways specifield, and "thence over * * * unnumbered roads to Weehawken, N. J., and thence across the Hudson River to New York, and return over

the same route." This certificate became effective on July 5, 1937. On or about December 22, 1937, the Lincoln Tunnel was opened to traffic. It passes under the Hudson River, connecting Weehawken and New York. Plaintiff immediately began to operate through the Tunnel instead of using the ferry, which it had formerly employed between Weehawken and New York. Plaintiff's new method of operation resulted in cessation of operations not only over the ferry, but also over Pershing Road, which leads to the ferry in Weehawken, and the inauguration of operations in Weehawken over that portion of Boulevard East extending south from its intersection with Pershing Road to the Tunnel entrance, serving intermediate points through the Tunnel to New York. From an earlier report of Division 5 of the Commission in this same case (42 M. C. C. 123) it appears that on December 23, 1937, plaintiff filed a change-of-route application [2] in which it sought the right to use the Tunnel rather than the ferry,

[2] This application and the Commission's general order of May 17, 1937, under which it was filed, are both attached as exhibits to the complaint. As indicated by this order, such applications were to be used only where the proposed change did not involve any substantial change in service between the terminal points or to and from intermediate and off-route points, and where there was no question of public convenience and necessity under Section 207 presented. This procedure was designed to permit such minor changes without a formal hearing and without compliance with Section 207, which ordinarily forbids the institution of new operations without proof that they are required by the public convenience and necessity.

and that no action was ever taken by the Commission on this application.

The Commission decided that plaintiff's certificate did not authorize operation through the Tunnel and that the new method of operation was therefore unlawful. The basis of its decision is indicated in the following excerpt from its report:

> With respect to operation through the Tunnel, defendant contends, on reply, that while we could not certify that public convience and necessity required operation through a nonexistent facility, we could and did grant to defendant, by the use of the term: "* * * and thence across the Hudson River * * *", a sufficiently broad authority to permit the defendant to change its route and make use of such new facility, if, as, and when the same became available.
>
> Obviously this contention is untenable. The "grandfather" clause of section 206 (a) of the act contemplates only the authorization of such bona fide operations as were engaged in on June 1, 1935, and continuously since, over the route or routes (insofar as is here pertinent) for which application is made. Whatever the intention may have been in incorporating the previously described description in defendant's "grandfather" certificate, plainly such certificate cannot be construed to authorize an operation which was not being conducted at the time the certificate was issued, and could not have been conducted at that time

or prior thereto. It will be noted, moreover, that the authority set forth in defendant's certificate is predicated upon the finding in the initial paragraph thereof—"* * *; that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since * * *."

We conclude that the term "unnumbered roads to Weehawken" in defendant's certificate, should be construed to mean the roads, highways, and streets over which defendant was operating on the statutory date and continuously thereafter until the effective date of its certificate, and that the above-described departure from such routes, including service at intermediate points between Pershing Road and the Tunnel entrance, subsequent to the effective date of its certificate is unauthorized thereunder. We further conclude that the term "thence across the Hudson River to New York", in defendant's certificate, refers to the method of crossing employed by it on the statutory date and on the effective date of its certificate in No. MC–2835, namely, the ferry, and does not authorize operation through the Lincoln Tunnel.

The Commission's decision was, however made—

* * * without prejudice to the filing of an application by defendant, under section 207 of the act, seeking authority to operate through the Lincoln Tunnel, or seeking temporary authority, under section 210 (a) of the act, as amended by the Sec-

ond War Powers Act, 1942, for such operation during the pendency of such application filed under section 207.[3]

The District Court, in its *per curiam* opinion, concluded that plaintiff's certificate was ambiguous, that its construction was for the Commission, and that the courts could not disturb such an interpretation unless it was clearly arbitrary or erroneous, which was found not to be the case here. It further concluded that even if it were free to interpret the certificate *de novo,* it would independently have reached the same result as did the Commission.

As appears from its jurisdictional statement, plaintiff attacks the court's decree and the Commission's action primarily on the following three grounds: (1) That the Commission's action amounts to a partial revocation, suspension, or change of plaintiff's certificate in violation of and without compliance with Section 212 of the Interstate Commerce Act (49 U. S. C. 312); (2) that plaintiff's certificate did convey the right to operate through the Tunnel; and (3) that plaintiff

[3] Plaintiff accordingly has since filed with the Commission an application under Section 207, requiring proof of public convenience and necessity for permanent authority to conduct operations through the Tunnel (Docket No. MC–2835, Sub. 10) and also an application for temporary authority to use the Tunnel (Docket No. MC–2835, Sub. 11 W). Under the latter application temporary authority to use the Tunnel was granted to plaintiff on August 1, 1944, and pursuant thereto it is presently operating in that fashion.

in any event received such right because of the Commission's acts in respect to its change-of-route application of December 23, 1937. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

(1) The present proceeding was not one to suspend, change, or revoke a certificate, as contemplated by Section 212 of the Act. That section provides for the amendment or revocation of a certificate by the Commission upon application by the holder, or upon complaint or the Commission's own initiative, after notice and hearing, for failure to comply with the Act, the Commission's lawful orders or regulations issued thereunder, or any term of the certificate. Here instead the question is one of construing an existing certificate, which does not specifically mention operations via the Tunnel to determine whether such certificate nevertheless, actually contemplated and authorized such operations. The Commission clearly has power to construe its orders. Thus the Supreme Court has held that the Commision possesses authority to construe its general accounting regulations and to apply them to particular situations.[4] Likewise in cases involving

[4] *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423; *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134, 140; See also *Chesapeake & Ohio Ry. Co.* v. *United States*, 5 F. Supp. 7, 14.

rate orders of the Commission the court has made it plain that if an order is indefinite or ambiguous application should be made to the Commission for interpretation and clarification.[5]

2. Both the Commission and the District Court have held, contrary to plaintiff's contentions, that plaintiff's certificate did not convey the right to operate via the Tunnel. The court, while indicating that it would have reached this result independently, nevertheless, concluded that the Commission's construction of its own certificate was binding upon it unless it was clearly erroneous or arbitrary. Plainly the court was correct in thus ascribing much weight to the Commission's interpretation. It is well settled that the court which issues a mandate is normally the best judge of its content on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141. No reason appears why this should not be equally true of a construction of its mandate by the Commission, especially in view of the great weight attached to its interpreta-

[5] *American Express Co.* v. *Caldwell*, 244 U. S. 617, 627; *Georgia Commission* v. *United States*, 283 U. S. 765, 772; see also *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232, 242, 244–5; *Illinois Commerce Commission* v. *Thomson*, 318 U. S. 675.

tions of the statute which it administers [6] and to its expert determination under the "grandfather" clause as to the scope of past operation.[7] And see *Illinois Commerce Commission* v. *Thomson, supra,* 680–1, 685.

Likewise, the court was correct in concluding that the Commission's interpretation of its certificate was not clearly erroneous or arbitrary. The Commission's construction of the certificate as limiting plaintiff to use of the ferry route actually employed by it during the "grandfather" period, was the only possible one in the light of its powers under the "grandfather" clause, and the general purpose of that clause. The Commission is empowered to issue a certificate under that clause to a carrier only if "any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time." Since the plaintiff did not and could not operate via the Tunnel route during the "grandfather" period, the Commission was not authorized under the "grandfather" clause to permit plaintiff to operate over that route. As has frequently been reiterated,

[6] *United States* v. *American Trucking Association,* 310 U. S. 534, 544.

[7] *United States* v. *Carolina Carriers Corporation,* 315 U. S. 475, 482–483.

that clause contemplates substantial parity between future operations and prior bona fide operations. *Alton Railroad Co.* v. *United States,* 315 U. S. 15, 22; *United States* v. *Carolina Freight Carriers Corp., supra,* 481; *Noble* v. *United States* 319 U. S. 88, 92; *Crescent Express Lines* v. *United States,* 320 U. S. 401, 409. Accordingly, the Supreme Court has consistently upheld restrictions imposed by the Commission upon carriers wherein it has sought to limit them with great precision to the exact type of service performed during the "grandfather" period. *United States* v. *Maher,* 307 U. S. 148; *Noble* v. *United States, supra; Crescent Express Lines* v. *United States, supra.*

This construction is also perfectly consistent with the terms of the language employed in the certificate. The Commission concluded that the phrases "unnumbered roads to Weehawken" and "thence across the Hudson River to New York" had reference not to any irregular route or territorial operation, but instead to the regular routes employed, and the method of crossing the river used by plaintiff during the "grandfather" period. This construction plausibly follows from the Commission's statements that its consistent practice has been to refuse to authorize passenger operations except over regular routes,* and that

* The statute in fact requires the Commission in certificates issued under Section 207 to limit the activities of passenger carriers to regular route operations between fixed termini.

the above authority was predicated upon the finding in the initial paragraph of the certificate "that the said applicant was in bona fide operations over said routes on June 1, 1935, and has so operated since." It is significant, too, as the District Court observed, that the certificate did not authorize transportation under but merely "across" the river. Furthermore, the Commission's construction of this certificate is consistent with its conclusions in other cases, one of them relating to certain of the intervening defendants, that where carriers, pursuant to pending "grandfather" clause applications, had been using the Weehawken ferry or the Holland Tunnel, they could not secure the right to change to the Lincoln Tunnel without proof that the public convenience and necessity required such operations. *Lincoln Tunnel Applications,* 12 M. C. C. 184, 195; *Pennsylvania Greyhound Lines, Inc., Lincoln Tunnel Route,* 30 M. C. C. 373.

3. Clearly, too, as the District Court held, the Commission's action with respect to plaintiff's change of route application of December 23, 1937, conveyed no rights to use the Tunnel. It is undisputed that the Commission took no action with respect to this application, and, as the court properly held, such inaction was not the equivalent of a favorable decision upon the application. *Union Stock Yard Co.* v. *United States,* 308 U. S. 213, 224.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.
DANIEL KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

DECEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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FEB 2 1945

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 913

ADIRONDACK TRANSIT LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM BY APPELLEE, HUDSON & MANHATTAN RAILROAD COMPANY.

JOHN E. BUCK,
JOHN F. FINERTY,
Counsel for Appellee, Hudson & Manhattan Railroad Company.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL 26-508

ADIRONDACK TRANSIT LINES, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants-Appellees.

STATEMENT AGAINST JURISDICTION INCLUDING MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, Hudson & Manhattan Railroad Company, intervenor-defendant-appellee herein, files its Statement against Jurisdiction, including its Motion to Affirm. The ground of said motion is that the questions presented by plaintiff-appellant's Statement as to Jurisdiction are not, as required by paragraph 1 of said Rule, substantial.

Nature of Case

This is an appeal from the order, judgment and decree of November 4, 1944, of the above Court, dismissing the petition of the plaintiff-appellant which sought to enjoin that portion of an order of the Interstate Commerce Commission, dated June 6, 1944, which directs the plaintiff-appellant to cease and desist from its motor bus operations between New York, N. Y. and Weehawken, N. J., via the Lincoln

Tunnel, and, in Weehawken, N. J., between the New Jersey entrance to the Lincoln Tunnel over Boulevard East to its junction with Pershing Road. Such cease and desist order was made in a complaint proceeding before said Commission, known as Docket MCC-164.

The Commission, on June 4, 1937, in a proceeding known as No. MC-2835, had issued a certificate to plaintiff-appellant pursuant to the provisions of the "grandfather" clause of Section 206(a) of the Interstate Commerce Act. The portions of that certificate here pertinent read as follows:[1]

"Certificate

* * * * * * *

After due investigation:

It appearing, * * * *that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since that time; and the Commission so finding: therefore,*

It is hereby certified, * * * applicant * * * is hereby, authorized (to operate) * * *, as a common carrier by motor vehicle of passengers * * *, over the regular routes, between the fixed termini, *and to or from the intermediate points,* specified below:

> Between Saranac Lake, N. Y., and New York, N. Y. * * * thence over New Jersey highway S 5, New Jersey highway 1, and (*from Fairview, N. J.*) *unnumbered roads to Weehawken, N. J., and thence across the Hudson River to New York,* and return over the same route. (Emphasis and interpolation supplied.)

Defendant's "grandfather" application, filed January 31, 1936, described that portion of its route extend-

---

[1] The quoted excerpt from the certificate is taken from the Commission's report of June 6, 1944, as shown on Sheet 2 of Exhibit E, attached to the petition of the plaintiff-appellant herein.

ing between Fairview and New York, which is the segment in controversy,[2] as follows:

> From Fairview to Weehawken Ferry via Hudson County Boulevard and East Boulevard. Then by ferry to New York City. The return route to be the same.

The record before the Commission showed, without contradiction, that prior to June 1, 1935, and at the time of the issuance of such certificate, and thereafter until the opening of the Lincoln Tunnel on or about December 22, 1937, the plaintiff-appellant had operated its motor bus service across the Hudson River between Weehawken, New Jersey and Forty-second Street, New York City, via the Forty-second Street Ferry of the West Shore Railroad. Upon the opening of the Lincoln Tunnel, the plaintiff-appellant, without further authority from the Commission, undertook to operate its motor bus service via the Lincoln Tunnel instead of such ferry. In the complaint proceedings referred to before the Commission in which the cease and desist order sought to be enjoined was made, plaintiff-appellant contended that the Commission's "grandfather" certificate of June 4, 1937, is to be construed as authorizing such motor bus operation by it via the Lincoln Tunnel, particularly in view of certain subsequent conduct of the plaintiff-appellant and of the Commission.[3]

---

[2] See italicized portion of route description in last paragraph of above-shown excerpts from certificate."

[3] The nature of the conduct of the plaintiff-appellant and of the Commission in this respect will not be set out, since, as will be shown later herein, even if such conduct warranted the construction contended for by the plaintiff-appellant of the Commission's "grandfather" certificate, that certificate, if so construed, would be beyond the Commission's authority. The nature of such conduct, however, is fully set out in the Commission's report of June 6, 1944, attached as Exhibit E to the petition of the plaintiff-appellant herein. It is also set forth in the Statement against Jurisdiction, filed by the defendants-intervenors-appellees, Manhattan Coach Line, Inc. et al.

In the Commission's report of June 6, 1944 (Ex. E attached to plaintiff-appellant's petition herein) on which the Commission based its cease and desist order of the same date, here sought to be enjoined, the Commission rejected such construction of its "grandfather" certificate of June 4, 1937, and held that such certificate authorized operation by plaintiff-appellant only via the Forty-second Street Ferry.

The petition of the plaintiff-appellant before the District Court seeking to enjoin the Commission's cease and desist order, in substance asked the District Court to set aside the Commission's construction of its "grandfather" certificate of June 4, 1937, and to construe said certificate as authorizing operation via the Lincoln Tunnel.

The District Court, by its *per curiam* opinion and its conclusions of law, held in substance:

1. The Commission probably lacked power to grant a "grandfather" certificate pursuant to 49 U. S. C. A., Sec. 306, which would authorize the use of a facility (the Lincoln Tunnel) not in existence in or prior to 1935, or even at the time of the issuance of the certificate. Accordingly, if possible, the certificate should be so construed as not to authorize such use, and the certificate can be so construed.

2. The words in Sec. 306, "within the territory," refer to carriers which, in the required period, had, in whole or in part, no regular routes, and the plaintiff did not come within that category.

3. The certificate does not authorize transportation under, but merely "across" the river.

4. If there is any ambiguity in the Commission's certificate, the Commission's interpretation of its certificate cannot be disregarded by the courts unless such interpretation is clearly erroneous or arbitrary, and the Commission's interpretation is neither.

5. The failure of the Commission to act on the application of December 23, 1937[4] is not the equivalent of Commission action. It is irrelevant that no such action was taken because Division 5 thought an order superfluous.

It is submitted that, on the following grounds, the statement as to jurisdiction filed by plaintiff-appellant presents no substantial questions of the validity of the findings of fact and the conclusions of law of the District Court, and that the order, judgment and decree of the District Court should, therefore, be affirmed.

Grounds of Motion to Affirm

The statement as to jurisdiction fails to present any substantial question as to the validity of conclusion of Law No. 1 of the District Court. In the absence of a showing of any substantial question as to the validity of conclusion of Law No. 1 any questions as to the validity of the other conclusions of law of the District Court are irrelevant.

The decisions of the Supreme Court of the United States conclusively establish the validity of Conclusion of Law No. 1.

It is to be noted that the statement as to jurisdiction makes no attempt whatever to show that the District Court was wrong in its Conclusion of Law No. 1 that

> "The Commission probably lacked power to grant a certificate pursuant to 49 U.S.C.A., Sec. 306, which authorized the use of a facility not in existence in or prior to 1935, or even at the time of the issuance of the certificate."

---

[4] The District Court obviously intended to refer to the application of December 21, 1937, which was an application by plaintiff-appellant for a change in route, via the Lincoln Tunnel. See Exhibit D-1 attached to petition of plaintiff-appellant herein.

The statement as to jurisdiction makes no reference to this Conclusion of Law, except to state (p. 11) that

> "The Three Judge Court raised the question of whether the Interstate Commerce Commission could grant the authority the plaintiff claims it received, but did not affirmatively reach a conclusion on that point."

Since the Statement as to Jurisdiction makes no other reference to such Conclusion of Law No. 1, it would appear that the plaintiff-appellant is under the impression that the fact that the District Court qualified its Conclusion of Law by the use of the word "probably", *ipso facto* raised before the Supreme Court of the United States a substantial question as to whether such Conclusion of Law was erroneous, and consequently it was unnecessary for the Statement as to Jurisdiction even to attempt to show that any substantial question was otherwise presented as to the validity of such Conclusion of Law. In this, it is submitted, the plaintiff-appellant is in error. In the absence of any attempt whatever in the Statement as to Jurisdiction to show that Conclusion of Law No. 1 of the District Court was erroneous, not only is no substantial question as to the validity of such Conclusion of Law presented by the Statement as to Jurisdiction, but that Statement thereby fails to present any substantial questions as to the validity of the other Conclusions of Law of the District Court since such other Conclusions of Law are irrelevant unless Conclusion of Law No. 1 is erroneous.

That Conclusion of Law No. 1 is unquestionably valid is shown by a reference to the relevant portions of Section 306, and to the decisions of the Supreme Court of the United States construing that section.

The so-called "grandfather" clause is contained in Section 306(a) of Title 49, U. S. C. A., popularly known as Sec-

tion 206(a) of the Interstate Commerce Act. The pertinent provisions thereof read as follows:

> "*Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest *was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory* for which application is made and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, * * *". (Italics supplied.)

Unquestionably, plaintiff-appellant was not, on June 1, 1935, or at the time of making application for a "grandfather" certificate, or when such certificate was issued, i.e., June 4, 1937, in bona fide operation over any route which included the Lincoln Tunnel, since the Lincoln Tunnel was not opened for operation until on or about December 22, 1937.

However, it might be contended that the plaintiff-appellant was in bona fide operation on June 1, 1935, "within the territory" in which the Lincoln Tunnel was subsequently opened for operation, and therefore was entitled to a "grandfather" certificate.

The District Court, however, held in its opinion that

> "The words in Sec. 306 "within the territory", refer, we think, to carriers which, in the required period, had, in whole or part, no regular routes; and the plaintiff did not come within that category."

This construction put by the District Court upon the words "within the territory" in Sec. 306, is conclusively supported by the construction put upon those words by the Supreme Court of the United States in *United States* v.

Maher, 307 U. S. 148. In that case, the Supreme Court said, (p. 158):

> "In differentiating between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory', Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208(a) 49 U. S. C. A. #308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."
>
> (See also *United States et al.* v. *Carolina Freight Carriers Corp.*, 318 U. S. 475, 480.)

Finally, in this connection, the Supreme Court of the United States has specifically held that the "grandfather" clause was intended to provide for

> "• • • substantial parity between future operations and prior bona fide operations." (*Alton R. Co.* v. *United States*, 315 U. S. 15, 22.)

Otherwise, as the Supreme Court said in *Noble* v. *U. S.*, 319 U. S. 88, 91,

> "The 'grandfather' clause would be utilized not to preserve the position which the carrier has obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935."

It is accordingly submitted that not only does the Statement as to Jurisdiction fail even to attempt to present any

substantial question as to the validity of Conclusion of Law No. 1 of the District Court, but that any such question is precluded by the cited decisions of the Supreme Court of the United States. It is further submitted that thereby all other questions sought to be presented by the Statement as to Jurisdiction become unsubstantial and irrelevant.

WHEREFORE, it is respectfully prayed that the decree and judgment of the District Court be affirmed.

Respectfully submitted,

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Hudson & Manhattan Railroad Company.

December 19, 1944.



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FEB 2 1945

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 913

ADIRONDACK TRANSIT LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM BY APPELLEES, MANHATTAN COACH LINE, INC., ET AL.

HENRY P. GOLDSTEIN,
Counsel for Appellees,
Manhattan Coach Line, Inc., et al.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL 26-508

ADIRONDACK TRANSIT LINES, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants-Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM DECREE AND JUDGMENT OF STATUTORY COURT

Statement Against Jurisdiction

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Manhattan Coach Line, Inc., Manhattan Transit Company, Westwood Transportation Co. Inc., Westwood Transportation Line Inc., Inter-City Transportation Co. Inc., Jersey City & Lyndhurst Bus Co. Inc., and Mountain Transit Corporation, intervenor-defendants and appellees herein, present this Statement Against Jurisdiction, and respectfully submit that the questions involved in the instant appeal to the United States Supreme Court are so insubstantial as not to need further argument

Facts

This is a suit filed by plaintiff to set aside a portion of an order of the Interstate Commerce Commission (par. I com-

plaint) which directs the plaintiff to cease and desist from its operations between New York, N. Y., and Weehawken, N. J., via the Lincoln Tunnel, and, in Weehawken, N. J., between the New Jersey entrance to the Lincoln Tunnel over Boulevard East to its junction with Pershing Road. The order, dated June 6th, 1944, stated:

> "We conclude that the term 'unnumbered roads to Weehawken', in defendant's certificate, should be construed to mean the roads, highways, and streets over which defendant was operating on the statutory date and continously thereafter until the effective date of its certificate, and that the above-described departure from such routes, including service at intermediate points between Pershing Road and the Tunnel entrance, subsequent to the effective date of its certificate is unauthorized thereunder. We further conclude that the term 'thence across the Hudson River to New York', in defendant's certificate, refers to the method of crossing employed by it on the statutory date and on the effective date of its certificate in No. MC-2835, namely, the ferry, and does not authorize operation through the Lincoln Tunnel."

and:

> "On reconsideration, we find that, in discontinuing operations over Pershing Road and the ferry, defendant has willfully failed to comply with the terms of its certificate in No. MC-2835; that its operation between the junction of Hudson Boulevard East and Pershing Road, in Weehawken, N. J., and New York, N. Y., over Hudson Boulevard East, serving intermediate points, and through the Lincoln Tunnel is unauthorized; and that such unauthorized operation is unlawful in violation of section 206(a) of the act."

The complaint is not specific as to the portions of the Commission's report and findings it objects to, but ob-

viously from its general wording it would refer to those portions of the aforequoted, which state:

> "We further conclude that the term 'thence across the Hudson River to New York', in defendant's certificate, refers to the method of crossing employed by it on the statutory date and on the effective date of its certificate in No. MC-2835, namely the ferry, and does not authorize operation through the Lincoln Tunnel."

in the first quotation, and all of the second quotation. The order of June 6th, 1944, also reads as follows:

> "With respect to operation through the Tunnel, defendant contends, on reply, that while we could not certify that public convenience and necessity required operation through a non-existent facility, we could and did grant to defendant, by the use of the term: '* * * and thence across the Hudson River * * *,' a sufficiently broad authority to permit the defendant to change its route and make use of such facility, if, as, and when the same became available.
>
> "Obviously this contention is untenable. The 'grandfather' clause of section 206(a) of the act contemplates only the authorization of such bona fide operations as were engaged in on June 1, 1935, and continuously since, over the route or routes (insofar as is here pertinent) for which application is made. Whatever the intention may have been in incorporating the previously described description in defendant's 'grandfather' certificate, plainly such certificate cannot be construed to authorize an operation which was not being conducted at the time the certificate was issued, and could not have been conducted at that time or prior thereto. It will be noted, moreover, that the authority set forth in defendant's certificate is predicated upon the finding in the initial paragraph thereof; '* * *; that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since * * *'."

The complaint alleges in substance that the plaintiff has the right to conduct those operations by virtue of the issuance to it of a Certificate of Convenience and Necessity in proceedings before the Commission, Docket No. MC-2835, annexed to the complaint and marked Exhibit A. The Commission in its report points out that the certificate also contains a provision: "That the said applicant was in a bona fide operation over said route on June 1, 1935, and has so operated since * * *." It also states that the certificate was issued: "in accordance with the requirements of Section 206 of the Motor Carrier Act, 1935."

The report and order of the Commission of June 6th, 1944, was the result of a complaint by certain motor carriers operating between New York and points in New Jersey (appendix A, answer of intervenors, Manhattan Coach Line Inc., et als.). They alleged in that complaint as follows:

> "1. The complainants are holders of certificates[1] of convenience and necessity issued pursuant to Sections 206 and 207 of the Motor Carrier Act and are engaged in the transportation of passengers, their baggage and express, in a short haul, regular route service, between points in Bergen, Hudson and Passaic Counties, New Jersey and New York City; portions of Bergen and Hudson Counties through which they operate being the territory through which the defendant conducts its operations.
>
> "2. The defendant is a long haul common carrier[2] engaged in the transportation of passengers and their baggage between New York City and points in New

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1 Manhattan Transit Company, MC-3700, MC-3700 Sub. 1.
Manhattan Coach Lines, Inc., MC-3699, MC-3699 Sub. 1.
Westwood Transportation Company, MC-3701, MC-3701 Sub. 1.
Westwood Transportation Lines, Inc., MC-3705, MC-3705 Sub. 1.

2 Adirondack Transit Lines, Inc., MC-2835.

York State through the State of New Jersey and is subject to the provisions of the Motor Carrier Act.

"3. Prior to December 22nd, 1937, the defendant, in the course of its long haul business, operated its lines from the Borough of Manhattan, City of New York, across the Hudson River via the 42nd Street Ferry to Weehawken, New Jersey. From Weehawken, N. J., it then proceeded northerly through Hudson and Bergen Counties to the State line of New Jersey and New York to its destination points in that State.

"4. On June 4th, 1937, a certificate of convenience and necessity, in accordance with the rules of procedure governing informal hearing, was issued to the defendant for the service it was then rendering, and insofar as portions thereof are pertinent to this complaint, it reads as follows: 'Across the Hudson River to Weehawken, New Jersey and then across unnumbered roads from Weehawken, New Jersey to New Jersey Highway 1, thence over New Jersey Highway S-5 to the junction of New Jersey Highway S-5 and over U. S. Highway 46' continuing from there to far distant points.

"5. The defendant, unlike most of these short haul operators using the Lincoln Tunnel at the present time, was and is still a long haul operator concerned with the transportation of passengers from points in New York State, north of the State of New Jersey on the one hand, to points in New Jersey and New York City on the other hand, and from New York City and points in New Jersey on the one hand as described in the certificate, to points in New York State, north of New Jersey.

"6. The findings of the Interstate Commerce Commission, as set forth in the certificate issued defendant named herein, were based on the report and recommendation of the District Supervisor who presided at the informal hearing on defendant's application. Therefore, the certificate should be interpreted

and defendant's operating rights determined in accordance with the intent of the District Supervisor, as set forth in his recommended report.

"Since the Lincoln Tunnel was not opened to the public until December 1937, and ferry transportation was the only transportation communication between Weehawken, N. J. and New York City, at the time, the phrase 'and unnumbered roads to Weehawken, N. J., and thence across the Hudson River to New York, and return over the same route,' should be interpreted as reading, 'to Weehawken, N. J., thence by ferry to New York City, and return over the same route.' It is improbable that the District Supervisor recommended a future right based on a different set of facts, or that the Commission would issue an order granting a right to operate over a non-existing route, i.e., from Weehawken, N. J. to New York City via the Lincoln Tunnel.

"7. A description of the route in Bergen and Hudson Counties, as set forth in the certificate, was never intended as an authorization to the defendant herein to engage in competition with short haul operators between New York City and points in Hudson and Bergen Counties. Again, the report and recommendation of the Supervisor should be referred to, to interpret the wording of the certificate in determining the extent of authority granted the defendant. The indefinite description of routes was not intended to permit defendant to engage in short haul operations and service between New York City and commuting points in nearby New Jersey, as is conducted by the complainants herein, but was so described as to permit defendant to retain a flexible operating right for the purpose of complying with local ordinances and laws governing operations of public vehi es in the communities through which it was required to pass in conducting its long haul operations.

"By defendant's arbitrary and unauthorized use of the Lincoln Tunnel as a method of communicating between Weehawken and New York City, it has

changed *its type of service* to interurban transportation and cannot be considered to have increased its legitimate service and facilities in accordance with its certificate.

"8. The complainants herein have been pioneer operators in the area covered in their certificates developing the short haul and interurban transportation system therein since 1922. They have at great sacrifice, experience and expense, developed an efficient and satisfactory service for the benefit of the public and prior to the opening of the Lincoln Tunnel have made great financial sacrifices to maintain that service.

"During this period of time, numerous long haul bus lines, such as Greyhound and others, have, of necessity, been running their routes through this area via the 42nd Street Ferry but have not been engaged in any short haul or suburban type of business. The defendant herein is in the category of the long haul operator such as Greyhound and while it has, of necessity, operated its buses through this area, it has not been engaged in any bona fide short haul business which it now attempts to claim by interpretation and cursory reading of the certificate issued to it.

"9. The use of the Lincoln Tunnel in lieu of the 42nd Street Ferry and specific designation of routes in Hudson and Bergen Counties in motor bus operations were the subject of protracted hearings in the so called Lincoln Tunnel cases, 12 M.C.C. 184, wherein it was decided definitely that the use of the Lincoln Tunnel required the proof of convenience and necessity, that routes in Hudson and Bergen Counties in service to Manhattan via the Lincoln Tunnel must be specifically designated, and that the right to use streets and highways previously not used also required the proof of convenience and necessity.

"The complainants were put to tremendous expense in the determination of these questions and they are, at the present time, conducting their operations in compliance with the determinations made thereunder.

They were compelled to and did prove public convenience and necessity for the use of the Lincoln Tunnel and such additional streets which they had not previously traversed.

"10. Since December 22nd, 1937, the defendant has discontinued to cross the Hudson River by the use of the 42nd Street Ferry and has been operating its services from mid-Manhattan to Hudson County via the Lincoln Tunnel under the Hudson River and has been traversing and using streets in Hudson and Bergen Counties now used by the complainants but never traversed by the defendant prior thereto.

The defendant has caused to be filed with the Interstate Commerce Commission new tariffs and is holding itself out to conduct a short haul business from points in Hudson and Bergen Counties to New York City via the Lincoln Tunnel.

"11. The complainants allege that the defendant by so doing has been conducting its operation since December 22nd, 1937 in deliberate disregard of the terms of the certificate of convenience and necessity issued to it.

"12. The defendant in operating in violation of the terms of its certificate and by the assumption of authority without having made application therefor is causing harm and damage to the complainants herein in that (a) it causes to be diverted short haul business to and from points in Hudson and Bergen Counties to New York City, which type of business it has at no time been entitled to as a matter of fact and pursuant to the records of the Interstate Commerce Commission as part of the certificate issued to it; (b) it is serving territory which it had not previously served; (c) it is holding out and engaging in a type of service never previously operated; (d) and is creating an unfair and destructive competitive situation.

"13. The operation in violation of the terms of the certificate have been deliberate and intentional and

have caused irreparable damage to the complainants and for that reason it is respectfully urged that pursuant to the authority in Section 212 of the Motor Carrier Act that the defendant be ordered (a) to immediately desist from operating through the Lincoln Tunnel and from engaging in the solicitation and handling of short haul business from points in Hudson and Bergen Counties to New York City and return; (b) that in the event that the defendant continues to operate in violation of the terms of the certificate and the intentions therein as contained in the records of the Interstate Commerce Commission, that its certificate be revoked and for any other and further relief that may be just and proper."

The matter of the complaint was set for hearing before an Examiner who accepted evidence and Division 5 of the Commission, on April 16th, 1943, made no finding of unlawful operation with respect to plaintiff's operation between Fairview and New York City over unnumbered roads or across the Hudson River via the Lincoln Tunnel. Complainants in the proceedings before the Commission petitioned for reconsideration and the entire Commission made its determination on June 6th, 1944, which is the matter being attacked herein.

Statutes Involved

The following sections of the Interstate Commerce Act are pertinent herein:

Section 206(a). Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the

Commission authorizing such operations: *Provided, However, That,* subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such a certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise, the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful * * *.

Sec. 207(a). Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public

convenience and necessity; otherwise such application shall be denied: *Provided, however, That* no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208(a). Any Certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6); *Provided, however, That* no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Sec. 204(a)(6). To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration;
* * *

Sec. 205(h). All the provisions of section 17 of part I shall apply to all proceedings under this part.

Sec. 17(3). The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

ARGUMENT

Point I

The only question presented is whether the Commission properly interpreted a certificate which it issued to the plaintiff and in so doing directed the plaintiff to cease from conducting an operation and service which it did not perform on June 1, 1935, and thereafter.

The Commission in respect thereto states as follows:

"With respect to operation through the Tunnel, defendant contends, on reply, that while we could not certify that public convenience and necessity required operation through a non-existent facility, we could and did grant to defendant, by the use of the term: '* * * and thence across the Hudson River * * *', a sufficiently broad authority to permit the defendant to change its route and make use of such new facility, if, as, and when the same became available.

Obviously this contention is untenable. The 'grandfather' clause of section 206(a) of the act contemplates only the authorization of such bona fide operations as were engaged in on June 1, 1935, and continuously since, over the route or routes (insofar as is here pertinent) for which application is made. Whatever the intention may have been in incorporating the previously described description in defendant's 'grandfather' certificate, plainly such certificate cannot be construed to authorize an operation which was not being conducted at the time the certificate was issued, and could not have been conducted at that time or prior thereto. It will be noted, moreover, that the authority set forth in defendant's certificate is predicated upon the finding in the initial paragraph thereof; '* * *;

that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since * * *.'"

There is no dispute as to the facts. The plaintiff did not operate via the tunnel and the prohibited streets in Weehawken prior to December 22nd, 1937, but has been operating over them since that time picking up and discharging passengers. The complaint (paragraph XIII) alleges in substance that from the date of the opening of the Lincoln Tunnel, the petitioner has been using the same and that travel between Weehawken, N. J. and New York City via the Lincoln Tunnel and the connecting highways in New Jersey is a considerably faster and more convenient route than that offered by the ferries; that it is much quicker, more expeditious, and that the ferry is considered antiquated and inconvenient; that the tunnel is not affected by fog and other conditions of the weather; that the ferry is subject to delays created by fog and other conditions.

Treating with the identical subject matter in applications involving the use of the Lincoln Tunnel, the Commission in 12 M. C. C. 184 stated as follows:

(Page 196):

"Upon this record, it is clear that the operation of applicants on Boulevard East between the Forty-Second Street ferry and the tunnel, over which intermediate service was rendered, is an extension of route resulting in a substantial increase in service. As above indicated, the operation through the tunnel results in a substantial saving in operating time. The benefits therefrom accrue from the use of an entirely new type of public facility and are of such a nature that a radical change in the riding habits of the public will ensue to the detriment of all facilities which do not use the tunnel but cater to the same traffic. Under these circumstances, and in view of our conclusions herein concerning the need for specific designation of streets, we are of the

opinion, and so find, that the operation through the tunnel constitutes a new service for which public convenience and necessity must be proved before a certificate may be issued authorizing such operation."

In so doing, it had rejected the identical argument presented here which the carriers involved in those proceedings had advanced. It adopted the same ruling in all subsequent applications involving the use of the Lincoln Tunnel, amongst which were:

Pennsylvania Greyhound Lines and *Central Greyhound Lines*, 30 M. C. C. 373;
Lincoln Transit Co. Inc., MC-58915 Sub. 3;
Atlantic Coast Lines Inc., MC-84675 Sub. 1;
Asbury Park-New York Transit Corporation, MC-1002 Sub. 1;
Coastal Cities Coach Company, MC-29682 Sub. 1;
Quaker City Bus Co., MC-265 Sub. 1;
Public Service Interstate Transportation Company, MC-3647 Sub. 16;
Northern Trails Inc., MC-39957 Sub. 1;
Eastern Trails Inc., MC-18975 Sub. 2;
Safeway Trails Inc., MC-84728 Sub. 2;
Frank Martz Coach Co., MC-3600 Sub. 1;
Central Greyhound Lines, MC-1503 Sub. 28;
Central Greyhound Lines, MC-1503 Sub. 29.

In one of those decisions decided as late as February 16th, 1943, Docket No. MC-228, the application of *Hudson Transit Lines*, they reaffirmed their position by stating as follows:

"Although applicant claims that the proposed Lincoln Tunnel route would be a change in operation only and not a change in service, the record shows otherwise. Since applicant has been using this route, its service has greatly increased. Prior to the opening of the Lincoln Tunnel applicant had no terminals or stops or

ticket agents in New Jersey. Thereafter stations at which tickets could be purchased were opened on the route between Paramus and the New Jersey-New York State line, and passengers are picked up and discharged on that part of the highway. Applicant is now doing a large business between points on the highway north of Paramus and New York City, obviously brought about by the savings in running time occasioned by use of the new route. We are of the opinion that the change in route has resulted in a substantial change in service and that before applicant may be authorized to engaged in the transportation thereover of express and newspapers it must establish proof of public convenience and necessity. Compare *Lincoln Tunnel Applications, supra.*"

The effect of these decisions and determination by the Commission simply stated is that the use of the Lincoln Tunnel and streets not operated on June 1, 1935, the statutory "grandfather" date, were subject to the provisions of Section 207 of the Act requiring the proof of convenience and necessity therefor.

Section 208 of the Motor Carrier Act specifies that any certificate issued under either Section 206 or 207 shall specify, amongst other things, the routes over which, the fixed termini, if any, between which and the intermediate and off-route points, if any, at which, the motor carrier is authorized to operate. Section 206 (a) says that subject to Section 210 if any carrier or predecessor in interest was in bona fide operation on June 1, 1935, over the route or routes for which application is made and has so operated since that time, then the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served. The wording of the certificate issued by the Commission cannot be interpreted to contain any greater authority than that which the Commission found in any proceedings before it to have been operated

by the holder thereof on June 1, 1935, and where it is found that certain operations, streets, or routes, not operated or used on the statutory date were sought to be used, that there would have to be a compliance with section 207.

The plaintiff herein saw fit to give its own interpretation to the authority contained in the certificate and in so doing assumed all of the risks incidental to the institution of an operation without authority from the Commission. In fact, it received notice by competitive carriers in the territory that its interpretation was improper and that the newly instituted operations were unlawful by the position taken before the Commission at the first informal conference and the mailing of a letter by registered mail on June 28th, 1937, and after the institution of the service by the filing of the complaint on January 15th, 1940.

The United States Supreme Court has already determined that operating authority pursuant to Section 206 can be no greater than the service rendered on June 1, 1935.

United States v. *Maher*, 307 U. S. 148, 152-153:

> "On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206 (a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206 (a) from the requirements of Section 207. The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that

time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established."

Page 155:

"The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory,' Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208 (a) 49 U.S.C.A. # 308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."

United States et al. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480:

"We think the Commission was justified in the restrictions which it placed on the geographical scope of appellee's operations. Sec. 206(a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor was 'in bona fide operations as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time.' Sec. 208 (a) requires that the certificate specify 'the routes over which, the fixed ter-

mini, if any, between which, and the intermediate and off route points, if any, at which and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate.' It is clear from these provisions that the power of the Commission to authorize future operations within a designated 'territory' rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant cases, it may extend to all points in a part of that area, and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. Alton R. Co. v. United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. —. The act, provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to service a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald v. Thompson, 305 U. S. 263, 266, 59 S. Ct. 176, 178, 83 L. Ed. 164."

Page 483 says:

"Sec. 206 (a) requires a showing that the applicant or its predecessor, was 'in bona fide operation as a common carrier' on June 1, 1935, and 'since that time.' By # 208 (a) the certificate must specify 'the service to be rendered' by the carrier."

Noble v. *U. S.*, 319 U. S. 88, 91, 92:

"• • • Keystone Transp. Co. Contract Carrier Application, 19 M.C.C. 475. In the latter case the power and duty of the Commission under Sec. 209 (b) to specify in the permit the 'business of the contract carrier covered thereby and the scope thereof' were

reexamined. It was held that that phrase meant 'more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in addition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier.' 19 M.C.C. 493.

"We agree. An accurate description of the 'business' of a particular contract carrier and the 'scope' of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type of class of shippers served. Unless the words of the Act are given that interpretation, permits under the 'grandfather' clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior bona fide operations' which is contemplated by the Act (Alton R. Co. v. United States, 315 U. S. 15, 22, 62 S. Ct. 432, 436, 86 L. Ed. 586) would be frequently disregarded. The 'grandfather' clause would be utilized not to preserve the position which the carrier has obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If

such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See Sec. 206 (a), Sec. 207, and Sec. 209 (b)."

It has also determined that the Commission's construction of the language of the Motor Carrier Act is entitled to great weight, especially in view of the fact that it was the Commission which proposed that Act of Congress.

United States v. *American Trucking Association,* 310 U. S. 534, 549.

It is also the duty of the Commission to weigh the evidence and make a determination as to the extent of the factual operations, and its findings are conclusive.

Alton R. Co. v. *United States,* 315 U. S. 15, 23:

"Appellant railroad companies also urge that Fleming should not have been awarded any rights under the 'grandfather' clause in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July, 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal. Thus there was evidence that on and since June 1, 1935, Fleming had been in bona fide operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the Courts."

Rochester Telephone Corporation v. *U. S.*, 307 U. S. 125, 138-140:

"While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act in 1906, and the Mann Elkins Act in 1910, the establishment of similar agencies in many states following the lead of New York and Wisconsin, the widespread recognition that these specific instances marked a general movement, made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This Court 'ascribed' to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois Central R. R. v. Interstate Commerce Commission, 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Recognition of the Commission expertise also led this court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

"From these general considerations the Court evolved two special doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452,

470, 30 S. Ct. 155, 160, 54 L. Ed. 280; Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

Page 146:

"The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body." Mississippi Valley Bargeline Co. v. United States, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 693, 694, 78 L. Ed. 1260; Swayne & Hoyt, Lt. v. United States, 300 U. S. 297, 303 et seq., 57 S. Ct. 478, 480, 81 L. Ed. 659.

The plaintiff has never questioned the authority of the Commission as aforesaid or it would not have accepted the certificate issued to it. The Commission is the sole judge after hearing and the presentation of evidence to determine whether the use of a new tunnel or additional streets require the proof of convenience and necessity pursuant to Section 207.

North-South Freightways, Inc. v. *United States, et al.*, District Court, Southern District, New York, February 29, 1944, Vol. 55, No. 7 Fed. Supp., p. 698:

"Even if we were disposed to disagree with the result reached by the Commission, we cannot substitute our own judgment for that of an administrative agency especially constituted, empowered and competent to decide such issues. Gray v. Powell, 314 U. S. 402, 412, 62 S. Ct. 326, 86 L. Ed. 301; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 490, 62 S. Ct. 722, 86 L. Ed. 971."

In respect to the Lincoln Tunnel and the additional streets involved in the operation as conducted after December 22nd, 1937, particularly the Lincoln Tunnel and operations over Boulevard East between the Lincoln Tunnel entrance and Pershing Road in Weehawken, the Com-

mission has made its findings in 12 M.C.C. 184, *Lincoln Tunnel* cases, and all subsequent cases cited herein on pages 11-12, to the effect that the use thereof results in the institution of a substantially new service which requires an application pursuant to section 207. The plaintiff never filed an application therefor (excepting the one it filed after the determination by the Commission on June 6th, 1944, and which is now pending) and it is no different from any other carrier who desires to use those same new facilities. In fact, if the Commission had found that it was different that determination would have been discriminatory. In like manner, the Commission's findings that the expression, "and thence across the Hudson River" in a certificate issued pursuant to section 206 does not include authority which requires the proof of convenience and necessity under section 207.

Section 208 requires that the terminal points and route, in the instance of a regular route carrier, be specifically described. The evidence is clear, the plaintiff and the Commission have agreed, that the operation involved herein is that of a regular route, terminal-to-terminal one transporting passengers for hire. If more than one route or street was being operated on June 1, 1935, they all should have been described in the certificate. In this instance, the only route being used on that day between Weehawken and New York was the Weehawken ferry and the streets in Weehawken were Boulevard East to the intersection of Pershing Road, thence along Pershing Road to the ferry entrance. In proceedings, 12 M.C.C. 184, the Commission also stated:

> "The considered operations involve mass transportation service entirely within a metropolitan area. To a large extent the communities in New Jersey adjoin one another and a substantial part of the territory is served over city streets which extend through two or

more communities. If streets were not designated, in many instances the description of the routes would consist merely of a list of points served and it would be possible for an operator to change its route at will and serve territory which it had not previously served and in which another operator had developed traffic. The result would be unfair and destructive competitive practices and unstable and uncertain service to the public. The public interest requires that authorized routes shall not be changed arbitrarily, and operators are entitled to protection against unauthorized encroachments in their territories. Upon this record there is no showing that this result can be accomplished in the New Jersey territory without a complete designation of each route." (pp. 197 and 198.)

If it developed, where a certificate was issued, that the Commission's description of the route was given an interpretation by the holder thereof which resulted in the institution of a new and different service, the Commission had the duty of determining in an appropriate proceeding, or upon the complaint of a carrier, to make clear and concise that which it had intended by the use of the expression. This argument has been the position of the intervenors as complainants before the Commission from the inception of the proceedings and the Commission has done nothing more than clarify the "ambiguity" occasioned by the institution of the unlawful operation herein by the plaintiff. The same is not truly an ambiguity. It is the plaintiff's interpretation of the words, "and thence across the Hudson River" and its determination is not founded on section 206 and the decisions of the Commission. The Commission can interpret and determine the questioned meaning of any words or phrases but such interpretation must conform to the facts of operation on June 1, 1935, and its findings in other cases on the same subject matter.

It is noteworthy that the plaintiff does not attack any other portion of the order of June 6th, 1944. The order also

found that the expression "unnumbered roads to Weehawken" in defendant's certificate should be construed to mean the specific roads, highways and streets over which said defendant was operating on the statutory date and continuously thereafter until the effective date of its certificate. In that respect, the Commission stated in its report:

> "In the prior report division 5 concluded that the term 'unnumbered roads' is indefinite but that it clearly implies the term or condition '*over reasonably direct unnumbered roads*'; and that it does not appear that defendant is now operating over 'unnumbered roads' that are questionable under that interpretation. That interpretation, in effect, may be understood as meaning that the term 'unnumbered roads' is the equivalent of 'irregular routes.'
>
> "We know of no instance where we have authorized a common carrier of passengers by motor vehicle to operate in any manner other than over specified regular routes, except where we have authorized special or charter operations. In this connection it is pertinent to note that section 207 of the act requires that we limit certificates issued to such carriers to regular routes between fixed termini. The interpretation of the disputed term in the prior report would permit defendant to change at will, within certain undefined limits of circuity, the route traversed on the statutory date and thus to traverse highways and serve intermediate points thereon not then traveled nor served.
>
> "An examination of numerous reports 'grandfather' application proceedings wherein we have granted authority for operation over unnumbered roads discloses without question that the term has been generally used to mean specific unnumbered roads of highways over which the applicants concerned operated on the statutory date and continuously thereafter to the time of determination of the respective proceedings. Such highways are detailed in the applications and in the evidence, but no number or designation had been assigned to them by the govern-

mental authorities under whose jurisdiction they fall. For examples of such usage see *Blue Way Trailways Inc., Common Carrier Application,* 21 M.C.C. 421, 427; and *Interstate Transit Lines, Common Carrier Application,* 9 M.C.C. 758, 764."

The Commission stated that in the proceedings, MC-C-164, it was not concerned with the question of revoking or vacating defendant's certificate but only whether the operations complained of were authorized by the certificate which it issued.

If the Commission's interpretation of the expression, "unnumbered roads to Weehawken" is proper, then the plaintiff has conceded the authority of the Commission to so interpret and, if it has the authority to interpret one portion of the certificate, it has the authority to interpret another portion of the certificate.

Point II

The Commission having determined in a series of cases before it that the use of the Lincoln Tunnel and streets not operated over on June 1, 1935, required an application pursuant to Section 207, or in an emergency pursuant to Section 210 or 204, the plaintiff has adequate remedies available before the Commission which it in fact has exercised and has received relief thereunder.

The Commission in its report on June 6th, 1944, pointed out to the plaintiff as follows:

"The findings hereinafter made are without prejudice to the filing of an application by defendant under section 207 of the act, seeking authority to operate through the Lincoln Tunnel, or seeking temporary authority, under section 210 (a) of the act, as amended by the Second War Powers Act, 1942, for such operation during the pendency of such application filed under section 207,"

The plaintiff has filed with the Commission an application for the use of the Lincoln Tunnel pursuant to section 207, which has been assigned Docket No. MC-2835 Sub. 10, and has also filed application for temporary authority or war emergency authority, docket No. MC-2835 Sub. 11 W, pursuant to which application the Commission has granted temporary authority. The Commission's findings that the use of the Lincoln Tunnel and the additional streets in Weehawken requires such an application being conclusive as against all carriers, and the plaintiff having exercised its available remedies before the Commission which permits it to have the opportunity of acquiring a certificate, the plaintiff has an adequate remedy at law based upon the determination of the Commission after appropriate hearing thereunder.

WHEREFORE, it is respectfully prayed that the decree and judgment of the statutory court be affirmed.

Dated: New York, N. Y., December 13, 1944.

Respectfully submitted,

HENRY P. GOLDSTEIN,
Attorney for Intervenor-
Defendant-Appellees,
Manhattan Coach Line, Inc.,
Manhattan Transit Company,
Westwood Transportation Co. Inc.,
Westwood Transportation Line Inc.,
Inter-City Transportation Co., Inc.,
Jersey City & Lyndhurst Bus Co. Inc.,
Mountain Transit Corporation,
Office and P. O. Address 1450 Broadway,
Borough of Manhattan, City of New York.

No. 913. ADIRONDACK TRANSIT LINES, INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. February 26, 1945. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Mr. Martin J. Kelly, Jr.* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al.; *Messrs. John E. Buck* and *John F. Finerty* for the Hudson & Manhattan R. Co.; and *Mr. Henry P. Goldstein* for the Manhattan Coach Line, Inc. et al., appellees. Reported below: 59 F. Supp. 503.